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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MASON B., a Person Coming Under
the Juvenile Court Law.

B240695
(Los Angeles County
Super. Ct. No. CK89671)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

KIMBERLY C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, S. Patricia Spear, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Roland Koncan, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Kimberly C. (mother) appeals an order denying her Welfare and Institutions Code section 388 petition seeking to vacate prior juvenile court orders.¹ Mother contends the orders must be reversed because she was not properly notified of pivotal hearings in this matter in violation of her due process rights. She also maintains it was in her son's best interest that the juvenile court vacate its orders and return this proceeding to its inception, and the court abused its discretion by refusing to do so. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Mason C., born in early September 2011, is the subject of this appeal. Mason came to the attention of respondent Department of Children and Family Services (DCFS) after he tested positive at birth for cocaine and methamphetamine. Mother had been diagnosed with bipolar disorder and PTSD, but refused to take her prescribed medication. Mother admitted using "speed" two days before giving birth to Mason. She was agitated and experiencing withdrawals when Mason was born. She caused such a commotion in the hospital that it was necessary to post a monitor outside her door, and to have one accompany her when she saw Mason. Mother believed she could care for Mason. She was not concerned that he had tested positive for drugs. Mason is mother's fifth child. Her two eldest children are being cared for by their maternal grandparents; the other two have been adopted. Mother could not identify Mason's father.

When DCFS interviewed mother at the hospital she was "direct and honest" about her drug use. She had used drugs on and off for over 8 years; her drugs of choice were methamphetamine and crack cocaine. During the interview mother both admitted and denied being homeless. Mother said she did not need DCFS's assistance because she already had housing, and had a case manager and received counseling services at Ocean Park Community Center (OPCC). She also said she often stayed with a woman named Lanita Hamilton, and had been staying at a transitional housing program before coming to the hospital.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

DCFS contacted Hamilton, at the Next Step housing program, who informed the agency that mother had been “in and out” of the program for five months, staying clean for a few days, but then disappearing for a while. Next Step is not a rehabilitation center. It is a program that facilitates clients’ connections with mental health, and alcohol or drug treatment and other programs, by providing transportation and support. DCFS also spoke with mother’s counselor at OPCC who said mother was “on the verge of being kicked out” of OPCC’s program due to noncompliance and her verbal abuse of staff and clients. Like Hamilton, the OPCC counselor believed mother required an inpatient detox program to become sober and a proper mental health evaluation. Mother had been kicked out of several programs for noncompliance or poor behavior.

Mason was detained in foster care, and DCFS filed a section 300 petition on his behalf on September 13, 2011. The petition alleged that Mason was born suffering from a positive toxicology for cocaine and methamphetamine, that mother had a lengthy history of illicit drug abuse, was a current substance abuser and used illicit drugs during her pregnancy with Mason, and had significant mental and emotional problems, all of which rendered her unable to provide regular care for Mason. The petition and addendum report indicated mother was homeless and that DCFS did not have a telephone number for mother, who also refused to provide any contact information regarding possible relative placements for Mason. Mother was not notified of the September 13 detention hearing.

Mother did not appear for the detention hearing. The court noted that DCFS had indicated mother was homeless, and that Mason’s father’s identity was unknown. The juvenile court found that notice of the proceedings had been given to all appropriate parties as required by law, and that a prima facie case for detention had been established. DCFS was ordered to conduct a due diligence search for mother and to identify Mason’s father for the jurisdictional hearing, which was set for October 12, 2011.

A declaration of due diligence was attached to DCFS’s report for the October 12 jurisdictional hearing. In that declaration DCFS identified an address for mother in Lufkin, Texas, and at 1619 Santa Monica Boulevard, Santa Monica DCFS also noted it

had learned that mother was on probation for a narcotics conviction. DCFS made three calls to the probation department. It was unable to contact mother's probation officer, whose voice mail box was consistently full and unable to accept messages.² DCFS had also initiated a request with the postal service for information regarding mother with regard to the Santa Monica address. A search of the Welfare Case Management Information System (WCMIS) revealed that mother had a welfare case, and was homeless. The DCFS declaration also stated that a social worker had tried unsuccessfully to find mother at three addresses of various programs at which she had reported receiving services. Notice of the October 12 jurisdictional hearing was mailed to mother care of OPCC, mother's last known address. A return receipt indicates the notice was received, but the signature is not legible.

DCFS recommended that mother not be offered family reunification services. (§ 361.5, subd. (b)(10), (11), (13).) That recommendation was based on mother's extensive history with Texas child services agencies due to her substance abuse and unresolved mental and emotional health issues, and her long-term, ongoing and admitted use of drugs two days before Mason's birth. Also, mother had not benefitted from prior services as regards her four eldest children. DCFS recommended that Mason be declared a dependent of the court pursuant to section 300, subdivision (b), and that no family reunification services be offered.

Mother did not attend the jurisdictional hearing. The juvenile court dismissed the count (b)(3) regarding mother's mental health for lack of evidence, and sustained as true the remaining counts regarding mother's drug history and Mason's positive drug test at birth ((b)(1) and (2)). The court found that notice of the hearing was proper and that mother's whereabouts were unknown. The dispositional hearing was continued to November 21, 2011. DCFS was ordered to contact Texas DCFS for information on

² One call was made to the probation office, which referred DCFS back to the probation officer's direct line.

family members who might be interested in the caring for Mason and ordered to notify all appropriate parties at their last known addresses for the next court date.

On October 24, 2011, a DCFS investigator received a phone call from Andy Schwieck, a staff member at Safe Haven, a homeless outreach program of OPCC, where mother received services “on a drop-in basis.” Schwieck told DCFS that mother had received the notice of the October 12, 2011 hearing after that hearing had taken place. He said mother wanted to attend future hearings and wanted to reunify with Mason. However, mother refused to provide any emergency contact information for herself or contact information for any relatives. Schwieck gave DCFS contact information for Jim Grizzell, mother’s case manager at OPCC. Grizzell actually handed the notice to mother on October 14; she opened it in his presence. DCFS scheduled a meeting with mother for October 28, 2011, but mother cancelled the meeting on October 27, saying she was sick. DCFS sent mother notice of the November 21, 2011 dispositional hearing care of Grizzell at OPCC. The notice was received at OPCC on October 31, 2011. Mother did not return to OPCC until November 28.

Mother did not attend the dispositional hearing on November 21, 2011.³ The juvenile court found that notice of the proceedings had been given to all appropriate parties as required by law. After receiving DCFS reports in evidence, the court detained Mason and declared him a juvenile court dependent. (§ 300, subd. (b).) Mother was denied reunification services because her whereabouts were unknown. The court continued the disposition hearing to December 20 for a progress report on locating relatives and records in Texas, and to consider whether to deny family reunification services to Mother pursuant to section 361.5, subdivision (b)(10) [failure to reunify with

³ Mother apparently was aware the hearing was being conducted on November 21 because, according to Grizzell, she went to court that day. However, when she arrived she was told by the clerk that the hearing had already finished, and she should return for the next hearing on December 21.

sibling] (11) [termination of parental rights to sibling] or (13) [parent's extensive history of drug abuse].

In early December, DCFS received records from the Department of Family Protective Services in Texas indicating that mother's two eldest children lived with their maternal grandparents. The maternal grandmother told DCFS she was unable to care for Mason, and there were no other relatives to consider for placement. Mother had relinquished her parental rights to her third child, who was placed with an adoptive family, as well as her fourth child, who had tested positive for crack cocaine at birth. On December 10, DCFS received a message from Grizzell at OPCC indicating mother wished to visit Mason. In a return message, DCFS informed Grizzell that mother needed to contact DCFS to set up visits. As of the submission of its December 19 report, mother had not yet contacted DCFS.

Mason's foster parents were devoted to him and planned to adopt him in the event parental rights were terminated.

Mother was not present for the progress hearing on December 20. The juvenile court found that notice of the hearing was proper. The juvenile court denied mother reunification services pursuant to section 361.5, subdivisions (b)(10), (11) and (13). The matter was set for a section 366.26 hearing on April 17, 2012.

Mother made her first appearance in this action on December 21, 2011. The juvenile court placed the matter on calendar in order to appoint counsel for mother and obtain her contact information. Mother's attorney provided an address at Safe Haven, 1751 Cloverfield Boulevard, Santa Monica. The attorney explained that mother did not reside at Safe Haven, but said she would receive mail and messages there. Mother said she might have Choctaw ancestry, and the court ordered that ICWA notice be given. She also said she was married and identified her husband, but said she had not seen him for five or six years and did not know his address. The court ordered DCFS to conduct a due diligence for mother's husband, set a hearing for January 11, 2012 and ordered mother to return for that hearing.

In the petition, mother requested that the juvenile court change the court orders rendered at the jurisdictional hearing, when it sustained counts (b)(1) and (2), and the dispositional orders, when it ordered permanent placement services and denied Mother family reunification services. With regard to the “new information” justifying the requested change of orders, the petition stated that mother had not been personally served nor was she sent written notice with return receipt requested. Mother argued she was never informed of the consequences or nature of the proceedings, the date, time and place of the hearings or her right to counsel. Mother requested that the juvenile court “[v]acate all findings and orders and allow [her] to have her day in court represented by counsel so she can challenge the allegations of the petition and fight for reunification services.” As for why it served Mason’s best interest to grant the petition, mother argued “It is always in the best interest of the minor for his parents to be allowed to have full substantive and procedural due process in dependency cases.”

In her *Ansley* motion, mother requested that the juvenile court vacate all orders made at the jurisdictional and dispositional hearings due to the deficiencies in DCFS’s efforts to find her and its failure to notify her of these proceedings.

The juvenile court set the petition for hearing on March 2, 2012. In response to the petition DCFS asserted that that, “(1) the mother had actual notice of the proceeding involving her child; (2) even if mother was not properly noticed of the proceeding, such procedural error was not a structural defect requiring setting aside of this court’s jurisdictional and dispositional orders; and (3) even if mother was not properly noticed of the proceedings, such error is harmless in light of the strong public interest in prompt resolution of dependency cases so that children may receive loving and secure home environments as soon as reasonable (sic) possible.” DCFS also argued that mother had actual notice of and came (too late) to the hearing on November 21, 2011, but was told by the clerk the case was already done and she should return on December 21, 2011. The case was actually on calendar December 20. Mother did not appear.

Mother did not attend the March 2, 2012 hearing on the petition. DCFS reported that mother had relapsed. The hearing was continued to March 16 because mother’s

attorney was ill. Mother also did not attend the March 16 hearing. The court denied the 388 petition. It found that mother actually had been given notice, but failed to appear. In addition, if and to the extent there was a failure to provide notice, the juvenile court found that error was harmless. The matter was set for a section 366.26 hearing in April 2012. This appeal followed.

DISCUSSION

1. Any error in the provision of notice was harmless beyond a reasonable doubt

Mother contends she never received notice of the detention, jurisdiction or disposition hearings in this action, that DCFS's failure to exercise reasonable due diligence to notify her violates her due process rights and constitutes a "fatal defect" in the juvenile court's jurisdiction requiring reversal of orders made at all three of those hearings. We conclude otherwise.

In *In re J.H.* (2007) 158 Cal.App.4th 174 (*J.H.*) we summarized the law regarding notice in dependency proceedings: "In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend." [Citation.] 'The child welfare agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. [Citation.] . . . ' [W]here a parent cannot be located notwithstanding a reasonable search effort, the failure to give actual notice will not render the proceedings invalid. [Citation.] [¶] ' . . . If a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them . . . ' [Citation.] [¶] . . . [¶] Unless there is no attempt to serve notice on a parent, in which case the error has been held to be reversible per se [citations], errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice." (*Id.* at pp. 182–183; see also *In re James F.* (2008) 42 Cal.4th 901, 918 (*James F.*) ["If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing

may be deemed harmless and reversal is not required.”].) “Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. [Citation.] [¶] However, there is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings.” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188 (*Justice P.*)).) If a parent cannot be located even though a reasonable search effort was made, the agency’s failure to give actual notice does not render the proceedings invalid. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 247.) We review de novo a juvenile court’s finding that DCFS has conducted a reasonably diligent search. (*J.H.*, *supra*, 158 Cal.App.4th at p. 183.)

Mother insists the juvenile court committed a “fatal” error, which requires reversal of all its orders, by exercising jurisdiction in this matter in which she was never actually notified of any of the hearings at which pivotal orders were made until November 21, 2011, when she was informally—and incorrectly—told by a court clerk to return to for a continued dispositional hearing on December 21.

We disagree with mother’s characterization of the error as “fatal.” The lack of strict compliance with notice requirements in a dependency proceeding does not render subsequent proceedings void in the absence of prejudice. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 625 [goal of resolving dependency actions expeditiously “would be thwarted if proceeding had to be redone without any showing the new proceeding would have a different outcome”].) This is especially true where, as here, a party receives late or defective notice, rather than no notice, and where the subject of the proceedings is waiting for security of permanent adoptive placement “as soon as reasonably possible.” (*James F.*, *supra*, 42 Cal.4th at p. 918.)

Mother concedes she was transient throughout these proceedings but complains that DCFS failed to try to notify her through Hamilton or the Next Step program, and made only one attempt to contact her through her probation officer. She also complains that, although the due diligence declaration filed by DCFS noted the agency searched 20 sources, DCFS failed to send a letter to an address in Texas uncovered in that search,

failed to provide information about the results, if any, obtained from a letter sent to one of two Santa Monica addresses, and failed to follow up on a lead obtained through WCMIS.

First, the record indicates that DCFS made not one, but three attempts to contact mother's probation officer. Likewise, mother does not assert that contacting Next Step or Hamilton would have yielded leads to locating her. Second, although DCFS does not appear to have sent notice to the address in Texas, and failed to provide follow-up information on its efforts to send notice to one Santa Monica address, mother does not maintain that, by doing so, DCFS might have obtained any information that would have facilitated its ability to find and notify her of this action. DCFS did contact Mason's maternal grandparents in Texas, but that contact did not yield any information regarding mother's whereabouts. As for the information DCFS obtained through WCMIS, it is unclear what further avenues mother would have had the agency pursue given that the information revealed that mother was homeless, something DCFS already knew.

More to the point, it appears that, just about a month from the inception of this action, mother had actual notice of the proceedings. The record reflects that, Schwieck, a staff member at OPCC personally gave mother the notice of this action within a few days after the October 12, 2011 jurisdictional hearing. Shortly thereafter, he contacted DCFS on mother's behalf to say she wanted to reunify with Mason. At the time, mother refused to provide DCFS any contact information for herself or for any of Mason's relatives. Schwieck gave DCFS Grizzell's contact information at OPCC. DCFS scheduled a meeting with mother for October 28, which mother cancelled. Notice of the November 21 dispositional hearing was sent to Grizzell at OPCC. OPCC received that notice on October 31. Mother did actually come to court on November 21, she just came too late to attend the 8:30 a.m. hearing. There is no indication in the record that mother, or anyone on her behalf, made an effort to contact DCFS after that hearing. On December 10, Grizzell did contact DCFS on mother's behalf to say she wanted to visit Mason. Mother never followed through to make arrangements for that visit.

There is no question that DCFS "has a duty initially to make a good faith attempt to locate the parents of a dependent child." But, "[o]nce a parent has been located, it

becomes the obligation of the parent to communicate with the Department and participate in the reunification process.” (*In re Raymond R.* (1994) 26 Cal.App.4th 436, 441.) After mother surfaced in October, she waited two months, making little to no effort to communicate with DCFS, and no effort to try to visit, learn anything about or to begin to establish any relationship with her infant son. Nothing in the record indicates that actual notice to mother would have changed the outcome of the hearings at issue. Indeed, when mother did finally appear in December, she listed the address for OPCC—the very address to which the prior notice about which she complains was served—as her mailing address.

On this record, we agree with DCFS that any notice defects were harmless because, even if mother had received actual notice of the detention, jurisdictional and dispositional hearings, there would have been no different result. In short, even if can be said DCFS failed to act with the requisite due diligence in attempting to locate and notify mother of the dependency proceedings, any error was harmless beyond a reasonable doubt. (*J.H.*, *supra*, 158 Cal.App.4th at p. 183.)

2. *The juvenile court did not abuse its discretion when it denied mother’s petition*

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party bears the burden to show, by a preponderance of evidence, both that there has been a change of circumstances or that there is new evidence, and that the proposed change or requested modification is in the child’s best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415–416.) A parent may raise a due process challenge based on lack of notice by filing a section 388 petition. (*Justice P.*, *supra*, 123 Cal.App.4th at p. 189.)⁴ We review the court’s ruling on a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) We will not disturb the order unless the juvenile court exceeded the limits of its legal discretion

⁴ The record indicates, and the parties agree, that the juvenile court considered mother’s *Ansley* motion and section 388 petition, collectively, as the petition. We will follow suit.

by making an arbitrary, capricious or patently absurd determination. If two or more inferences reasonably can be deduced from the facts, we lack the authority to reweigh the evidence or to substitute our decision for that of the juvenile court. (*Id.* at pp. 318–319.) In ruling on a modification petition, “the court may consider the entire factual and procedural history of the case.” (*Justice P., supra*, 123 Cal.App.4th at p. 189.)

Mother’s petition requested that the court vacate its jurisdictional orders made on October 12, 2011 (sustaining counts (b)(1) and (2)), and the dispositional orders made on November 21 and December 20, 2011 (ordering permanent placement services and denying reunification services). The new information cited to justify the requested change was that mother had not been properly served or notified of the fact, nature or consequences of those proceedings. Mother claimed vacation of the orders was in Mason’s best interest because it would provide “his parent[] . . . full substantive and procedural due process.”

We will assume, for purposes of discussion, that mother showed changed circumstances because she did not receive proper notice of the proceedings. Even so, mother did not come close to carrying her burden to show that vacation of all extant orders and returning the case to square one to start proceedings anew so she could receive reunification services, was in Mason’s best interests.

The concept of a child’s best interests ““is an elusive guideline”” that cannot be rigidly defined. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 66.) To decide whether mother met her burden, the juvenile court must consider such factors as the seriousness of the problem that led to the dependency and the reasons for the problem’s continuation; the degree to which the problem may be and has been removed or ameliorated; and the strength of the relative bonds between the dependent child and the child’s parents and caretakers. This list is not exhaustive. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1229.)

The problem which led to mother’s loss of custody, her long-term substance abuse, chronic homelessness and loss of custody of or failure to reunify with Mason’s siblings, were very serious and not easily remedied. Mother has never had Mason in her custody and, at least intermittently, appears to have continued to abuse drugs and to have

remained homeless throughout this proceeding. Mason lives with his foster parents who love and adore him, and are committed to adopting him and providing him a stable, permanent home.

The relief sought by mother—vacating the detention, jurisdictional and dispositional orders and essentially starting the case over—would result in a very lengthy delay that would unnecessarily postpone permanency and stability for a child who has been in foster care his entire life. Mother’s only contact with Mason was when she visited him in the hospital after he was born 13 months ago. The law is clear that at this stage in the proceedings, Mason’s right to permanency and stability is paramount. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) The juvenile court acted well within its discretion in denying mother’s petition.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.